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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 934 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

PATEL PARSHOTTAM SHAVJI

Versus

PATEL RAMJI KURJI

Appearance:

MR SURESH M SHAH for Petitioner
MR PV HATHI for Respondent No. 1
NOTICE SERVED for Respondent No. 4

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 24/11/2000

ORAL JUDGEMENT

1. This appeal is preferred by the original defendant no.2 Patel Purshottam Savji of Special Civil Suit No. 9 of 1973, decided against him by the learned Civil Judge, Senior Division, Gondal on 28.2.1979 whereby the learned judge was pleased to declare and pass a decree to the effect that the delivery of possession of

12 bighas of land in survey no. 11 admeasuring 19 Acres 11 Gunthas situated on the sim land of village Anida was not given to defendant no.1 (present respondent no.4) in accordance with the provisions of law, but the defendants no. 1 and 2 had wrongfully taken possession thereof and, therefore, the present possession of the suit land held by the defendant no.2 (appellant) is wrongful, unlawful and void and, therefore, he is not entitled to hold the possession of the suit land. The learned judge has further ordered and decreed that the plaintiffs are entitled to get back possession of 12 bighas of land of survey no.11 admeasuring 19 Acres 11 Gunthas from defendants no. 1 and 2.

2. Before narrating the case of the parties, it is necessary to give relationship between the parties. The plaintiff no.3 Patel Kurji Devji is the father of plaintiff no.1 Ramji Kurji, plaintiff no.2 Nanji Kurji and defendant no.3 Patel Hirji Kurji. The plaintiff no.3 Kurji Devji and defendant no.3 Hirji Kurji expired during the pendency of the suit and their heirs have not been brought on record. The aforesaid facts are undisputed facts on record.

3. It is the case of the plaintiff that the plaintiff no.3 Kurji Devji purchased agricultural land bearing survey no.11 on the sim of village Anida under sale deed dated 18.1.1923. Besides the same, the plaintiff no.3 also held movable and immovable properties as an owner. The plaintiff no.3 along with his sons i.e. plaintiffs no. 1 and 2 were doing agricultural operations jointly and all the properties were joint properties between Kurji Devji and his three sons. According to the plaintiffs, the defendant no.3 HirjiKurji was doing speculative business at Dhoraji and, therefore, he separated from his father and mother under release deed dated 4.12.1958. The defendant no.1 Patel Kantilal Narsinhbhai & Co., a partnership firm of Dhoraji filed a suit being Regular Civil Suit No. 105 of 1969 against defendant no.3 Hirji Kurji for a declaration that the defendant no.3 has got 1/4th share in the land bearing survey no. 11 and the said share is liable to attachment and sale in execution of the decree obtained by it against the said defendant no.3 for Rs.3257/- on 22.7.1969. In fact, the defendant no.1, the partnership firm, filed execution proceedings to recover the decretal amount from defendant no.3 and in execution of the decree, he got attached 1/4th share of defendant no.2 in the agricultural land bearing survey no.11. The plaintiff no.3 Kurji Devji filed an application under Order 21 Rule 58 of the Civil Procedure Code for raising

attachment. The said application was allowed on 11.8.1961 and consequently the attachment taken out by defendant no.1 against 1/4th share of defendant no.3 in the agricultural land bearing survey no.11 was raised. The defendant no.1, the partnership firm, thereafter filed Regular Civil Suit No. 172 of 1961 under the provisions of Order 21 Rule 63 of the Civil Procedure Code. The said suit was allowed and it was declared that the suit property, namely 1/4th undivided share of defendant no.3 Hirji Kurji in the suit agricultural land bearing survey no.11 is liable to attachment and sale in execution of the decree passed in favour of defendant no.1 and against the defendant no.3 in Civil Suit No. 105 of 1959 in the Court of Civil Judge, Junior Division, Dhoraji. The attachment was raised and the suit property was put for public auction and it was sold by public auction on 2.12.1963 and the defendant no.1 purchased 1/4th undivided share of defendant no.3 at public auction. Thus, the defendant no.1- firm acquired right, title and interest in 1/4th share of defendant no.3 in the suit agricultural land. The release deed dated 4.12.1958 executed by defendant no.3 Hirji Kurji relinquishing his share from the joint family property was not held to be proved in Regular Civil Suit No. 172 of 1961 and it was held that the defendant no.3 has got his 1/4th share in the suit property bearing survey no.11 and, therefore, the interest of defendant no.3 in the suit property was joint with the plaintiffs and, therefore, the auction purchaser should take proper steps in partition of 1/4th share in the suit property. According to the plaintiffs, the sale by public auction was irregular and illegal as the sale proceeds were not conducted in conformity with the provisions of law and, therefore, the same were not binding to them. It is further the case of the plaintiffs that the defendant no.2 entered into an agreement, purchased the disputed land from defendant no.1 and obtained possession of the disputed land on 10.1.1964. According to the plaintiffs, the alleged possession was not delivered to the defendant no.1 or defendant no.2 on his behalf in accordance with law. Thereupon, the plaintiffs filed Regular Civil Suit No. 38 of 1964 for permanent injunction and the said suit was dismissed on 9.2.1965. Civil Appeal No. 61 of 1965 was filed against the said judgment and order and the said appeal was also dismissed on 31.8.1965. The plaintiff no.3 executed sale deed dated 28.4.1964 in favour of plaintiffs no.1 and 2 in respect of the disputed property bearing survey no.11 and he handed over possession of the disputed land to plaintiffs no. 1 and 2 and they are in possession of the disputed land. In substance, it is the case of the

plaintiffs that the defendants no. 1 and 2 cannot hold the possession of 12 bighas of land and they cannot take possession from the plaintiffs and, therefore, the plaintiffs are entitled to recover possession of 12 bighas of land from the plaintiff no.2. In the circumstances, the plaintiffs have filed the present suit.

4. The defendant no.2 (present appellant), in his written statement Ex. 10, denied that the suit property was the self acquired property of plaintiff no.3 Kurji Devji. According to him, release deed dated 4.8.1958 was made with a view to defeat the claim of defendant no.1 and the said release deed was not held to be proved in Regular Civil Suit No. 172 of 1961. According to him, the 1/4th undivided share in the suit property of the defendant no.3 was legally sold in execution proceedings. He, therefore, contended that the defendant no.3 has 1/4th share in the suit property. He justified his possession in pursuance to the sale proceedings.

5. The defendant no.1 filed its written statement at Ex. 11 and denied that the suit property was self acquired property of plaintiff no.3. It was contended that the release deed dated 4.12.1958 was made with a view to defeat the claim of the defendants. It was denied that the suit property was joint between the plaintiffs and the defendant no.3. According to the said defendant, the defendant no.2 purchased the suit land from defendant no.1 under sale deed dated 15.1.1965 and he has been in possession since 10.1.1965.

6. The defendant no.3 Hirji Kurji filed his written statement at Ex.64 and admitted that he executed release deed in question and he was separated from his brothers and he had relinquished his share in the joint family property. He was joint with his brothers and father upto 4.12.1958. In substance, he has supported the plaintiffs' suit claim.

7. The learned trial judge, after framing necessary issues Ex. 15 and after appreciating the evidence on record, passed judgment and decree in favour of the plaintiffs as stated above.

8. Mr.S.M.Shah, learned Counsel for the appellant, at the outset, submitted that the impugned judgment and decree passed by the trial court is a nullity inasmuch as it was passed in favour of the parties who died during the pendency of the suit and whose heirs were not brought on record. The suit property was adjudged to be joint

ancestral property by the competent court and in absence of heirs of Kurji Devji and Hirji Kurji who died during the pendency of the suit, the decree passed in favour of the remaining plaintiffs is a nullity.

9. Mr.Mehta, learned Counsel appearing for the original plaintiff no.2, for Mr.Hathi, after inviting my attention to the averments made in para 15 of the plaint, submitted that the original plaintiff no.3 Kurji Devji, by a registered sale deed, as per the understanding arrived at,sold the land to original plaintiffs no. 1 and 2 and, therefore, he is entitled to retain possession and in view of this, the judgment and decree is valid as far as the plaintiff no.2 is concerned.

It may be stated at this stage that during the pendency of this appeal, the original plaintiff no.1 Ramji Kurji had also expired on 12.5.1994 and his heirs and legal representatives have not been brought on record.

10. As stated above, the defendant no.1, a partnership firm, filed suit being Regular Civil Suit No. 172 of 1961 in the Court of learned Civil Judge, Senior Division, Gondal for declaration that the defendant no.3 Hirji Kurji has got 1/4th share in the land bearing survey no.11 and that the said share is liable to attachment and sale in execution of the decree obtained by the plaintiffs against the said defendant in Regular Civil Suit No. 105 of 1959 and Darkhast No.271 of 1959. That suit was resisted by the present plaintiffs by inter alia contending that there was partition of the ancestral and joint family properties on December 5, 1958 and as a result of that partition, the present defendant no.3 executed a deed of release in favour of the plaintiffs and, therefore, the defendant no.3 is no longer the owner of the suit property and as per the partition, the plaintiffs had undertaken to pay debt of defendant no.3 owing to a cooperative society. It appears that during the trial of the said suit, the original plaintiffs amended the plaint by deleting the main relief of setting aside the deed of release and confined their prayer to the relief, namely that the 1/4th share of the present defendant no.3 in the suit property was liable to attachment and sale in execution of the decree obtained by the said plaintiffs in Regular Civil Suit No. 105 of 1959.In the said suit, the court came to the conclusion that the present defendant no.3 has 1/4th share in the suit property bearing survey no.11 and that the suit property is liable to attachment and sale in execution of the decree of the said plaintiffs against the present

defendant no.3. It was found that the deed of release was a sham transaction and without consideration and was executed to defeat the claims of the creditors. Therefore, the suit was decreed by passing an order that "the plaintiffs suit is allowed and is hereby declared that the suit property, namely the 1/4th undivided share of defendant no.4 (present defendant no.3 Hirji Kurji) in the suit wadipada field bearing survey no.11 and admeasuring 19 A.11 G. is liable to attachment and sale in execution of the decree of the plaintiffs passed against defendant no.4 (Hirji Kurji) in Regular Civil Suit No. 105 of 1959 of the Court of Civil Judge, Senior Division, Dhoraji dated 22nd July 1959 and consequently the order passed summarily in favour of the defendants no. 1, 2 and 3 in raising attachment of the plaintiffs in their application under Order XXIRu.e 58, being Civil Misc. Application No. 9 of 1961 on 11th August 1959 in the execution proceeding being Darkhast No.271 of 1959 filed by the plaintiffs against the defendant no.4 is hereby set aside."

11. Against the said judgment and decree, the original defendants no. 1 to 3 (present plaintiffs) filed an appeal being Civil Appeal No. 10 of 1962 and the learned Assistant Judge, Rajkot District at Gondal confirmed the findings arrived at by the learned trial judge. A further appeal being Second Appeal No. 160 of 1963 was filed by the present plaintiffs before this Court and the same was also dismissed on 17.2.1970 (M.U.Shah,J.).

12. The aforesaid facts would clearly go to reveal that the suit land was a joint and ancestral property and that the defendant no.3 Hirji Kurji also had 1/4th share in the suit property. Thus, all the plaintiffs as well as the defendant no.3 were co-sharers of the ancestral property. In view of the aforesaid proceedings, when the said finding is recorded, the plaintiff no.3 Kurji Devji could not have sold the said property in favour of his other sons, namely plaintiffs no. 1 and 2 by ignoring his third son Hirji Kurji, the defendant no.3. Thus, when the property in question is undivided ancestral property and in any case, the surviving plaintiff no.2 Nanji Kurji is not the exclusive owner of the suit property, no judgment and decree can be passed in absence of the heirs and legal representatives of plaintiff no.3 Kurji Devji and the defendant no.3 Hirji Kurji, who admittedly died during the pendency of the suit. In my opinion, the judgment and decree passed by the trial court is required to be set aside on the ground that it is passed against dead persons.

13. In the result, this appeal is allowed. The judgment and decree passed in Special Civil Suit No. 9 of 1973 dated 28.2.1979 by the learned Civil Judge, Senior Division, Gondal is set aside. No order as to costs.

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